IN THE MATTER OF MERCHANT MARINER'S DOCUMENT NO.Z-1055120 AND ALL OTHER SEAMAN'S DOCUMENTS
Issued to: ANTONIO YOUNG, JR

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1688

ANTONIO YOUNG, JR

This appeal has been taken in accordance with Title 46 United States Code 239b and Title 46 Code of Federal Regulations 137.30-1.

By order dated 2 August 1967, an Examiner of the United States Coast Guard at San Francisco, California, revoked Appellant's seaman's documents upon finding him guilty of the charge of "conviction for a narcotic drug law violation." The specification found proved alleges that while a holder of the document above described, on 28 November 1956, Appellant was convicted in Municipal Court for the City and county of San Francisco of violation of §11721 of the Health and Safety Code of the State of California.

Appellant did not appear at the hearing. The Examiner entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence documentary proof that Appellant was in fact holder of the document in question on the date alleged and that Appellant had been convicted as alleged.

Because of Appellant's absence, nothing was offered in defense.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification had been proved. The Examiner entered an order revoking all documents issued to Appellant.

The entire decision was served on 17 August 1967. Appeal was timely filed 14 September 1967, and was perfected on 12 January 1968.

FINDINGS OF FACT

On 28 November 1956, Appellant was convicted in Municipal

Court for the City and County of San Francisco of violation of §11721 of the Health and Safety Code, a narcotic drug law of the State of California, by reason of use narcotics.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant states that this conviction in 1956 was only a "misdemeanor" conviction, and that between the time of that conviction and April 1966 "a period of almost ten years, I have paid my debt to Society with six and one-half consecutive years in prison."

Appellant points out that service of the charges in the instant case was accomplished on 11 October 1966, little more than a month before the statute of limitations would have run for service of the charges upon him.

It is asserted also that the Examiner was overly severe in considering Appellant's case, because Appellant could not be present for his hearing because he was at sea.

It is further asserted that he was convicted under the provisions of §11721 of the California Health and Safety Code, a narcotic law "that does not now exist." In his initial notice of appeal, Appellant had also stated that this section of the California Code "was repealed as being unconstitutional several years ago."

APPEARANCE: Appellant, pro se.

OPINION

I

The first point that will be considered is the claim that Appellant was prejudiced because the Examiner did not hear his side of the matter, since Appellant was at sea at the time of the hearing.

The record shows that notice of hearing was served on Appellant on 11 October 1966 at San Francisco, (the case had been transferred to that port from Honolulu at Appellant's request.) The notice gave time and date as 10:00 a.m. on Friday, 13 January 1967. When the Examiner opened the hearing on the scheduled date, having waited three quarters of an hour for Appellant to appear, no word had been received from Appellant. Indeed, up until 2 August 1967, when the Examiner issued his decision, there was no communication from Appellant.

An examiner will hear any reasonable request for postponement. When he hears none, he has no choice but to proceed in absentia. When a person charged has deliberately and without excuse (no excuse being urged even on appeal) failed to appear or communicate, he cannot explain that he was not afforded a fair hearing.

II

Appellant urges that with a little more time before service of charges he might have escaped hearing completely, since he had little more than a month to go before the ten years set by the statute would have run. This is true.

But the Congress set ten years as the period, and there can be no doubt that the service here was achieved within the limits that Congress set.

It may be conceded that under certain mitigating conditions, responsible field personnel might appropriately recommend that no action be taken on such an old conviction. But Appellant himself has raised in this case, and the record fully reflects, the reasons why such discretionary action would have been inappropriate.

The six and one-half consecutive years in prison which Appellant points to were not the result of the conviction involved in this case.

The record shows that Appellant was first convicted of contributing to the delinquency of a minor in 1951 and was sentenced to five year's probation. In 1952, Appellant was convicted on five counts of larceny, forgery, and other offenses, and, with some sentences ordered to be served concurrently, ended up with an overall ten year sentence. This occurred in Honolulu. Appellant was paroled from this imprisonment on 9 March 1955, the parole period to end on 24 October 1959.

Thus, on Appellant's conviction in the instant case he was on parole from Hawaii, but California gave him only ninety days for the narcotics conviction.

Subsequently, again in Hawaii, Appellant was convicted of first degree robbery on 20 November 1959, and was sentenced to thirty years' imprisonment. There is evidence that on 10 June 1966, four months before charges were served in this case, Appellant was still serving under the thirty year sentence.

This record does not paint such a picture as to persuade a

reviewer that there was a clear abuse of the exercise of an authority conferred by statute to prefer charges within a period of ten years after conviction of an offense against a narcotics control law.

While the primary purpose of Congress was to keep narcotics offenders off American ships, it is scarcely inappropriate to consider an offender's whole record of criminal conduct in determining whether to utilize the means provided by the Congress to protect American shipping and the general welfare of the United States insofar as it may he harmed by undesirable American seamen.

III

The next point to be discussed is one not directly raised by Appellant but which is raised by the record itself.

The specification alleges, in the form usually used, that Appellant's conviction occurred while he was holder of a Merchant Mariner's Document. The Investigating Officer felt bound to offer proof, and the Examiner deemed it appropriate to accept proof, that Appellant was in fact holder of a document on 28 November 1956, the date of the conviction.

This reflects a misconception of the meaning of 46 U.S.C. 239b. A denial of issuance of a document may be made if the "narcotics conviction" occurred within ten years before the date of application. In the case of a revocation of a document, while the statute had, at enactment, a starting date, the starting date is of no more significance because more than ten years have run since 14 July 1954.

It does not matter whether the holder of a document at the time charges are served was the holder of a document on the date of his conviction. It is enough that the conviction took place within the ten years before service of charges; the document, although its issuance could have been denied in the first place, may still be revoked.

Thus a specification need not allege that the person charged "was a holder" of a document on the date of conviction, only that he is on the date of service of the charges a holder of a document, and that the conviction occurred within the requisite period.

IV

What might have been Appellant's most important point is his reference to the status of §11721 of the California Health and Safety Code.

Appellant asserts that this section no longer exists, and also that it was repealed because it was held unconstitutional. Neither assertion is correct.

Section 11721 still exists, although it has been amended since Appellant's conviction.

Section 11721 was never declared unconstitutional.

Appellant apparently has in mind the decision of the Supreme Court of the United States in Robinson v. California, 370 U.S. 660. In that case, the Court considered &11721 as it was then phrased:

> "No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less that 90 days nor more that one year in the county jail. The court may place a person convicted hereunder on probation for a period not to exceed five years and shall in all cases in which probation is granted require as a condition thereof that such person be confined in the county jail for at least 90 days. In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in the county jail."

It considered the instruction of a trial judge to a jury which contained this language:

> "All that the People must show is either that the defendant did use a narcotic in Los Angeles County, or that while in the City of Los Angeles he was addicted to the use of narcotics . . . "(p. 663)

It noted that the case never reached the Supreme Court of California because under the State's law the ruling of the Appellant Department, Superior Court of California, Los Angeles County was final. It noted also that the decision in this case was derived from an earlier, unpublished decision of the same Appellant Department.

The Supreme Court was not considering the validity of all of §11721. It was not considering the language dealing with use of narcotics, or being under the influence of narcotics, but only that dealing with "addiction."

The Supreme Court very carefully limited its consideration, and holding, to the case framed in the trial judge's instructions to the jury that a person could be convicted upon proof only that he was an "addict" within the State of California, without more: without proof of use, possession, or anything else.

The opinion of the Court ended:

> "We deal in this case only with an individual provision of a particularized local law as it has so far been interpreted by the California courts." (p. 668)

It is obvious that while even the "addiction" clause of the statute was not struck down, and the court left the way open for California to reinterpret its statue in a manner not inconsistent with the decision, a conviction purely for "addiction" could not be sustained. The way left open by the Supreme Court, with respect to "addiction" alone, was not really left open.

At the next session of the California Legislature this fact was apparently recognized because it amended §117219

This amendment omitted the troublesome reference to "addiction" but left the rest of the statute unchanged, and unchallenged.

It can be said that the points made by Appellant are not correct because:

(1) The Supreme Court never declared the entire statute unconstitutional;

(2) The statute was not repealed because it was unconstitutional;

(3) The statute does exist today.

A question might have been raised by Appellant if he had been able to claim that his conviction under §11721 had been within the ruling condemned by Robinson v. California. Had he shown this, the decision here would have to be reversed. Had he not shown this, but only raised a question, the case here might have had to be remanded for ascertainment of the phrase of the California Code section, as it then read, under which he was convicted. Appellant has resolved this question himself. In his first notice of appeal, dated 14 September 1967, he stated, "I was convicted of being a user of drugs . . .".

This admission not only takes this case outside the Robinson

v. California ruling completely, but, if the fact had to be argued, takes him out of the "conviction" provision of 46 U.S.C. 239b and into the "user" provision of that section under which conviction need not, but may be proved.

ORDER

The order of the Examiner dated at San Francisco, California, on 2 August 1967, is AFFIRMED.

P. E. TRIMBLE
Vice Admiral, U. S. Coast Guard
Commandant

Signed at Washington, D. C., this 19th day of March 1968.

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